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Supreme Court of the United States

OCTOBER TERM, 1938

No. 161

ERNEST K. JAMES, Individually and in his Official Capacity as Acting Tax Commissioner for the State of West Virginia,
Appellant,

v.

UNITED ARTISTS CORPORATION, a Corporation,
Appellee.

BRIEF FOR APPELLEE

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WOODYARD-PRINTERS, CHARLESTON, W. VA.

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v.

UNITED ARTISTS CORPORATION, a Corporation,
Appellee.

BRIEF FOR APPELLEE

THE SUIT.

This is a suit in equity brought by United Artists Corporation against the Tax Commissioner of the State of West Virginia to enjoin him from collecting a tax based upon gross income of appellee derived from distributing motion picture films to exhibitors in West Virginia. The case was heard by a District Court of three Judges on appellee's application for interlocutory and permanent relief. No evidence was taken, the cause being submitted on a stipulation of facts, and it was agreed that the hearing should be final. The relief prayed for was granted. The opinion delivered by the three Judge Court on May 20, 1938, is reported in *United Artists Corporation* v. *James*, 23 F. Supp. 353.

STATEMENT OF THE CASE

The following facts appear from the stipulation (R. p. 29): The appellee is a Delaware corporation, with its chief office in New York City. It has motion picture films which it distributes to exhibitors (theatre owners and managers) throughout the United States for exhibition by such exhibitors in theatres operated by them. It maintains branch offices in many cities, including Cincinnati, Ohio, Pittsburgh, Pennsylvania, and Washington, D. C. These three offices and the New York office are the only ones that do any business with exhibitors in West Virginia. Appellee has no branch, office, agent or employee in West Virginia, and owns no property within the State. It does not own, operate, or have any interest in any theater in West Virginia.

In distributing films to exhibitors in West Virginia, the appellee makes public announcements of the films it has or will have to offer. Exhibitors then apply in writing to the appellee in New York or at one of the above mentioned branch offices, for such films as they may want. Such applications are in the form of offers for the use of the films for a specified period, sometimes for a specified sum, sometimes for a stipulated percentage of the gross box office receipts therefrom. When an application is accepted, a contract is made by executing a written acceptance thereon. The contract requires the exhibitor to return each film to the appellee at its office in New York or at one of the branches, or to ship it to another exhibitor if so directed.

As was found by the Court in *United Artists Corporation* v. *James*, *supra* (R. p. 36):

> "Always the contracts are made in New York, the films are produced and owned outside the State of West Virginia, and the films are shipped from without the State of West Virginia into the State of West Virginia to the exhibitor and are afterwards again shipped out of the State of West Virginia, and payments by the exhibitor are sent to and received by plaintiff (appellee) without the State."

The stipulation further shows that: In 1936 the appellee made 1,546 shipments of films to 144 theatres in West Virginia; these shipments made but one stop in the State, excepting that on two occasions a shipment made two stops before leaving the State; on eight occasions the appellee had box office receipts of exhibitors checked by independent contractors who never collected any moneys; an employee of the appellee comes into West Virginia to stimulate the use of appellee's films.

The appellant, the State Tax Commissioner, claims the right to collect from the appellee a tax of one per cent of the gross proceeds received by the appellee for supplying films to West Virginia exhibitors. His claim is based upon the following state statute (Sec. 2-(i), Art. 13, Ch. 11):

> "Upon every person engaging or continuing within this state in the business of collecting incomes from the use of real or personal property or of any interest therein, whether by lease, conveyance or otherwise, and whether the return be in the form of rentals, royalties, fees, interest or otherwise, the tax shall be one per cent of the gross income of any such activity: *Provided*, That any person who shall make return of and pay a personal net income tax on the incomes covered by this section two-(i) shall not be required to pay the tax herein imposed upon said incomes."

Pursuant to such claim, the appellant has made tax assessments upon the appellee of more than $4,000.00, and has demanded that the same be paid, and has made threats to the appellee and to sundry exhibitors of appellee's films that he will attach funds due to the appellee from such exhibitors, will attach or summarily distrain appellee's films in the possession of such exhibitors, and will invoke all other civil remedies and the criminal penalties provided by statute.

ARGUMENT

Summary

The errors assigned and urged by appellee are the findings of the District Court that

(1) Appellee is not doing business in West Virginia;

(2) Appellee is engaged in interstate commerce;

(3) The tax sought to be levied is an invalid burden upon interstate commerce.

Upon the facts stipulated each conclusion of the District Court seems plainly right. Appellee is not engaged in West Virginia in the business described in the taxing statute invoked, is not engaged in West Virginia in business of any kind, and so far as this case is concerned it is engaged in business solely in the State of New York. That the business in which appellee is engaged is clearly interstate commerce has been repeatedly held by State and Federal Courts. Appellant admits in brief that the State can not by a tax place a direct burden upon interstate commerce. It is respectfully submitted that the questions on which the decision of this cause depends have been settled by prior decisions of this

Court, and that the judgment of the District Court should be affirmed.

Appellee is Not Doing Business in West Virginia

The first assignment of error is the holding of the District Court "that the plaintiff never has been and is not now engaged within the State of West Virginia in the business of collecting incomes from the use of real or personal property or interest therein, whether by lease, conveyance or otherwise, and whether the return be in the form of rents, royalties, fees, interest or otherwise."

It seems inconceivable that appellee can be held to be engaged within the State of West Virginia in the business of collecting incomes. The contract is made in New York. Appellee ships the films, and so makes delivery thereof to the exhibitor, the consignee, in New York, receives them when returned in New York, and under the contract collects its income therefrom in New York. The business sought to be taxed by the State of West Virginia is wholly done in New York or at one of said branches outside the State of West Virginia. So far as this case is concerned, New York is the only place in which appellee is collecting income or doing business.

Appellant argues that he is attempting to tax the local business of exhibiting films and collecting box office receipts from customers who pay to see the films; that appellee has an interest in that activity and is therefore engaged in that business. This argument is unsound. Such local business is the business of an exhibitor, not of a distributor; it is the business of operating a theater; and the legislature has recog-

nized and taxed such business and activity by the enactment of Section 2 (g), Article 13, Chapter 11, which is as follows:

> "Upon every person engaging or continuing within this state in the business of operating a theater, opera house, moving picture show, vaudeville, amusement park, dance hall, skating rink, race track, radio broadcasting station or any other place at which amusements are offered to the public, the tax shall be equal to one half of one per cent of the gross income of the business."

Appellant must admit that he is collecting his full measure of tax upon the exhibition of films under Section 2 (g). In seeking to tax under Section 2 (i), Article 13, Chapter 11, the alleged interest of appellee in the gross income of the theater business, appellant places himself in the illogical and indefensible position of undertaking to tax under Section 2 (i) an activity not described therein, or on the face of the section taxable thereunder, but clearly described in and taxable under Section 2 (g), thus proposing to doubly tax appellee's share (according to appellant's contention) of the gross income of the business of operating a theater. If appellee is engaged in the local business of exhibiting pictures or has an interest in that business as contended, the gross income from such business or interest is fully taxed under Section 2 (g) at the rate of one-half of one per cent, as the legislature intended. Every cent received for the exhibition (whether it belongs to the theater owner or the distributor) is thus taxed. But appellant argues when this once taxed interest of the distributor in the gross income of the business of operating a theater reaches the distributor it becomes rental from the lease of personal property and is taxable a second time under Section 2 (i) at a rate double that of the tax already paid thereon, and this notwithstand-

ing the plain purpose of Section 2 (i) to avoid double taxation.

To state appellant's proposition is to refute it. If appellee is engaged in business in West Virginia as appellant contends, that business is the operation of a theater, and appellee is now paying its tax under Section 2 (g) as such operator. If appellee's business is that of leasing personal property, as it clearly is, then that business is not taxable by the State of West Virginia, because the statute was not intended to, and does not, apply to the collection of income in the State of New York arising from business carried on wholly without the State of West Virginia, as the District Court found upon the facts stipulated. The fact that the films come to rest in West Virginia for a period before leaving the state would be material only if it were sought to subject them to a property tax. Such fact does not subject the income from the lease of the films to an excise tax. Railroad rolling stock may be subject to a property tax in a State in which it is used, but the income it earns in interstate commerce can not be taxed by a state. *Galveston, etc. R. Co.* v. *Texas*, 210 U. S. 217.

Appellant says in his brief that Section 2 (h) of Article 13, Chapter 11 is also involved in this case. That section imposes a tax upon every person engaged within the state in any business not otherwise specifically taxed under the statute. Under the facts, appellee can not conceivably be engaged in any business other than leasing films or exhibiting films. Leasing is specifically taxed by Section 2 (i). Exhibiting films (operating a theater, moving picture show, or other place at which amusements are offered to the public) is specifically taxed by Section 2 (g). Therefore, Section 2 (h) can have nothing to do with the case.

The distributor has no control over films after they leave New York other than the right to insist that they be used and returned in accordance with the terms of the contract of lease. It does nothing in connection with the films in West Virginia other than to promote their use and to see on rare occasions that the amounts paid to it in New York are those payable under the terms of the lease.

Appellant's brief, in discussing the facts, says that appellee's business consists of procuring and having theater owners to exhibit its motion picture films. Perhaps terminology is not important, but the stipulation and the exhibited contract show that appellee is engaged solely in leasing films to exhibitors.

The Supreme Court of Appeals of West Virginia has held that a foreign corporation may send its salesmen into the state to take orders and that it may come to the state in order to collect for or recover the merchandise sold, without qualifying to do business in the state, saying in *Underwood Typewriter Co.* v. *Piggott*, 60 W. Va. 532, 55 S. E. 664, that:

> "A foreign corporation, which sells and delivers goods, merchandise, machinery, or other articles of trade and commerce in this state upon orders taken therefor by its agents and traveling salesmen, and forwarded to it, and not otherwise, and transacts no other business in the state, does not transact or carry on business in this state, within the meaning of Sec. 30 of Ch. 54 of the Code."

In *United, etc. Machine Co.* v. *Carney*, 116 W. Va. 224, 179 S. E. 813, it is held that a Maine corporation leasing a machine for use in West Virginia by an agreement made in New Jersey, is not doing business in West Virginia. In *Pennywitt* v. *Blue, State Tax Commissioner*, 73 W. Va. 718,

81 S. E. 399, the Court holds that "the legislature cannot be deemed to have intended to subject brokers engaged exclusively in interstate transactions to the license tax."

Under his first point appellant cites eleven cases to support his position that appellee is doing business in West Virginia. In every one of these cases the corporation involved was engaged in activities entirely different from those involved in the instant case, and many of these cases definitely hold that activities similar to those in which appellee is engaged do not constitute "doing business." In the cases cited by appellant the corporations involved were engaged locally in one or more of the following activities: Managing hotels, engineering, maintaining offices, owning and managing personal property, installing equipment, servicing machinery, receiving payments, carrying on an established business. For instance, in *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, 61 L. Ed. 460, it was held that a company that owned land and employed others to do engineering and other work for it thereon was doing business in the state where such work was carried on, but that the mere leasing of property and "doing only what was necessary to receive and distribute the income therefrom" was not doing business. In three of the cases a net income tax was involved. Such cases have been distinguished from gross income cases by the appellate court of West Virginia in *Gas Co.* v. *Hall*, 102 W. Va. 272, 135 S. E. 582, which decision was affirmed on appeal, Id. 274 U. S. 284, 47 Sup. Ct. 629, 71 L. Ed. 1094. In none of the cases cited was a tax upon gross receipts from commerce involved.

The cases cited by appellant are authority for what has been held to be doing business and what has been held to be not doing business. They are persuasive authority that

appellee is not doing business in West Virginia. And the court of last resort of the State of West Virginia has clearly and repeatedly indicated that no activity of the appellee in West Virginia is such as can be held to constitute doing business in West Virginia.

The "business of collecting incomes" and the "business of operating a theater" have been clearly distinguished by the West Virginia legislature and a different rate of taxation exacted for the privilege of engaging in the separate businesses. The only local business carried on in connection with the films is that of "operating a theater." In *North v. Ohio Oil Co.*, 83 Mont. 353, 272 Pac. 534, it was sought to impose an occupation tax for the privilege of producing oil on a lessor upon the theory that he was engaged in the business of producing oil because he received a share of the proceeds from such production. The Court held that the lessor was not engaged in such business because "he merely grants a right to the operator to engage in such business upon his land. * * * The well is subject to the exclusive control of the lessee so long as he performs all of the conditions of the lease * * *."

It is respectfully submitted that appellee is not engaged within the State of West Virginia in the business of collecting incomes from the use of real or personal property, and that the statute sought to be invoked by appellant has no applicability to the activities of appellee under the very terms of the statute.

Appellee is Engaged in Interstate Commerce

The second assignment of error is the finding that the acts of appellee constitute interstate commerce.

In 1923, in an anti-trust case, this Court determined that the distribution of moving picture films is interstate commerce. *Binderup* v. *Pathe*, 263 U. S. 291, 68 L. Ed. 308, 44 Sup. Ct. 96. Since that time that decision has been followed by the Federal Courts. *United States* v. *Paramount*, 34 F. (2d) 984, 282 U. S. 30, 75 L. Ed. 145, 51 Sup. Ct. 42; *Fox Film* v. *Federal Trade Comm.*, 295 F. 353; *U. S.* v. *First National Pictures*, 34 F. (2d) 815; *Majestic Theatre* v. *United Artists*, 43 F. (2d) 991; *Paramount Publix* v. *Hill*, 11 F. Supp. 478, are some of the Federal decisions that have held that the interstate character of the distribution of films "is no longer open for consideration since the decision of Binderup v. Pathe". State courts of last resort have likewise cited and followed *Binderup* v. *Pathe*. *Glass* v. *Hoblitzelle*, (Tex. Civ. App.) 83 S. W. (2d) 796; *State* v. *Paramount*, 178 La. 818, 152 So. 534; *Paramount, etc. Co., et als*, v. *Henneford, et als, Tax Com'rs*, 184 Wash. 376, 51 Pac. (2d) 385. Each of these cases considered the "broken package" or "coming to rest" theory, and the latter two cases involved attempts by states to impose taxes upon the proceeds from the distribution of films. No case having been found to the contrary, it is inconceivable that it can be seriously argued that film distribution is not interstate commerce.

The facts in *Paramount* v. *Henneford*, *supra*, are almost identical with, but are not as strong as, those in the instant case because in the former case the distributor maintained a

branch office in the state which sought to impose the tax. In no case cited above are the facts stronger than the facts in the case at bar.

Appellant's brief states that the State is not presuming to tax the act of distribution, but seeks to tax those activities carried on within the State, after actual distribution and interstate commerce has ceased. This and every other argument advanced by appellant was advanced by the dissenting opinion in the case of *Paramount* v. *Henneford*, *supra*, and these arguments were again advanced upon the application to this Court for the writ of certiorari in that case. (The writ was refused: 298 U. S. 665.) But the dissenting State judges in that case and the appellant here have misconceived the nature of the tax sought to be imposed. It is not upon the exhibition of the films or upon the box office receipts of local theaters. That activity and those proceeds are adequately taxed, as has been heretofore pointed out. The sole function of the distributor is to supply the films, and that function is completed when the films are delivered to the exhibitor by transportation without the State.

Under his second point appellant cites ten cases to support his position that a business may be interstate commerce and at the same time be subject to state taxes or regulation. Of these ten cases only one (*Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250) involved a tax upon gross receipts from commerce, and in that case the commerce involved was local in character. Such of the other cases as dealt with taxation at all involved property taxes upon personal property that had lost its interstate character and had become part of the general mass of property within the state. Typical of these cases is *Minnesota* v. *Blasius*, 290 U. S. 1,

which holds that states may subject to a property tax chattels that have come to rest within a state and which are under the control and at the disposal of the owner. And the Court holds therein that a state can not tax interstate commerce by laying a tax upon the business or the privilege of engaging therein or upon receipts derived therefrom.

Appellant misconstrues the decisions he cites. None of them hold that gross receipts from interstate commerce are subject to state taxation. That local activities which are separate and distinct from interstate commerce may be taxed and that property that has been withdrawn from interstate commerce can be subjected to a state property tax is not questioned, but such propositions have no application to the instant case. The act of leasing films involved in this case is interstate commerce, and it is this activity which is sought to be taxed by the appellant. No property tax is involved. The act of exhibiting films is intrastate commerce and taxable by states under applicable statutes. But if appellee were engaged in such activity it would be adequately taxed under Section 2 (g). Appellant is now receiving his full measure of tax under that section for all film exhibiting activities in the state. Appellee's activity can not be put in, and incidentally taxed as belonging to, one taxable class for the purpose of subjecting it to taxation at the rate imposed by the statute upon a different taxable class. If its business be leasing of films, that activity is in interstate commerce, and not taxable by the state. If its business be exhibiting films, that activity is being taxed by the state at the rate fixed by the legislature.

The Tax is an Invalid Burden on Interstate Commerce

The third assignment of error is the awarding of the permanent injunction. Under this point appellant argues that if the offending tax on appellee's acts is a burden on interstate commerce, such burden is indirect and incidental.

This Court has so consistently held that a State tax can not constitutionally be laid upon gross receipts from interstate commerce that it would seem unnecessary to cite cases in support of the proposition.

In *Adams* v. *Storen*, 82 L. Ed. 870, 58 Sup. Ct. 913, 304 U. S. 307, this Court said:

> "We conclude that the tax is what it purports to be—a tax upon gross receipts from commerce. Appellant's sales to customers in other States and abroad are interstate and foreign commerce. The Act, as construed, imposes a tax of one per cent on every dollar received from these sales. * * * We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, Section 8 of the Constitution."

Appellant apparently admits, as he must, that the state can not place a direct burden upon interstate commerce. But he again argues that the State may tax local activities and property which is removed from interstate commerce, a sound proposition but not applicable to the instant case. He cites twenty-six cases, a number of which (*Bacon* v. *Illinois*, 227 U. S. 502; *Wiloil Corp.* v. *Pa.*, 294 U. S. 169; *Federal Compress & Warehouse Co.* v. *McLean*, 291 U. S. 17) are cited under the second point in his brief and are in line with the holding in *Minnesota* v. *Blasius*, *supra*.

Some of the cases (*American Steel & Wire Co.* v. *Speed*, 192 U. S. 500; *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82; *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604) uphold a state property tax upon personal property that has become separated from interstate commerce. No property tax is involved in the case at bar. Three of the cases (*Browning* v. *Waycross*, 233 U. S. 16; *General Railway Signal Co.* v. *Va.*, 246 U. S. 500, *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165) uphold the right of a state to require a license to engage in a local activity. The gas cases cited (*East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465; *Southern Natural Gas Corp.* v. *Alabama*, 301 U. S. 148; *Public Utilities Commission* v. *Landon*, 249 U. S. 236; *Missouri ex rel Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298) are to be distinguished from the one at bar. In them the business of selling and distributing locally natural gas after the interstate transportation thereof had been completed was held taxable. The motion picture cases cited (*Mutual Film Co.* v. *Industrial Commission of Ohio*, 215 F. 138, 236 U. S. 230; *Mutual Film Corp.* v. *Hodges*, 236 U. S. 248; *Fox Film Corp.* v. *Trumbull*, 7 F. (2d) 715; *Boynton* v. *Fox*, 60 F. (2d) 851; *Eureka Productions* v. *Lehman*, 17 F. Supp. 259, affirmed 302 U. S. 634) involve an exercise of police power in censoring films.

None of the cited cases hold that a state may place a tax upon gross receipts from interstate commerce. Some of them hold the converse. *Adams* v. *Storen*, *supra*, distinguishes many of the cases cited from the one at bar in this language:

> "So far as the sale price of the goods sold in interstate commerce includes compensation for a purely intrastate activity, the manufacture of the goods sold,

> it may be reached for local taxation by a tax on the privilege of manufacturing, measured by the value of the goods manufactured, or by other permissible forms of levy upon the intrastate transaction. It is because the tax, forbidden as to interstate commerce, reaches indiscriminately and without apportionment, the gross compensation for both interstate commerce and intrastate activities that it must fail in its entirety so far as applied to receipts from sales interstate."

No fault is found with the authorities cited by appellant other than the fact that they are not at all applicable in the instant case (except as they hold that gross receipts from interstate commerce may not be taxed by a state). In support of his argument that the tax under consideration is not a burden upon interstate commerce, appellant advances the same argument that he advances for each of his propositions, i. e., that the activity sought to be taxed is the local exhibition of the films, which activity he very properly says is local in character and is not interstate commerce. As has been repeatedly pointed out, this is the activity of the exhibitor, it has been recognized as a distinct and different activity by the legislature, and is adequately taxed. Under the "leasing" section of the statute appellant seeks to impose a tax upon the income derived by appellee from the lease of films, which activity is in fact the only one in which appellee is engaged, and which income is derived from interstate commerce.

* * * *

In concluding his brief appellant repeats a number of assertions. Appellee's positions in regard to each of such assertions are repeated seriatim:

1. Appellee is not doing business in West Virginia, and is not engaged therein in collecting incomes by lease or otherwise.

2. The fact that appellee's business is entirely interstate commerce presents an obstacle to the imposition of a state tax upon the gross proceeds of such business.

3. The exhibition of appellee's films by theater owners in West Virginia is a local activity and it is not contended that a tax thereon is a direct or indirect burden on interstate commerce.

(a) It is agreed that appellee's business is not interstate commerce merely because the contract was formed in New York; but it is submitted that performance of such contract in New York places such business within the protection of the Commerce Clause. Such performance consists of delivery of films to West Virginia theater owners outside of West Virginia, the return of films to appellee outside of West Virginia, and payment for the right to exhibit the films to appellee outside of West Virginia.

(b) It is agreed that exhibition of films is a local activity. But exhibition of films is not the business of appellee.

(c) It is agreed for the purposes of this case that a tax on the exhibition of films is valid. But the tax sought to be imposed is not a tax on the exhibition of films and is a burden upon interstate commerce.

(d) It is agreed that a tax on exhibition of films in West Virginia can not be repeated by other states, but it is not agreed that a tax on the gross proceeds from the leasing of films in New York can not be repeated by a state other than West Virginia.

4. The tax sought to be imposed is violative of the Commerce Clause, which justifies appellee's complaint.

5. The judgment appealed from should be affirmed.

Most of appellant's assertions could be conceded without leading to any conclusion other than that the judgment appealed from is plainly right. Under point "E" in his brief, appellant says that the tax sought to be imposed "is not a tax based upon the business of leasing and distributing of motion picture films in West Virginia, but is upon the business of collecting rents, royalties, etc." This unusual statement does not serve to clarify appellant's position. Both "leasing" and "collecting rents and royalties" in West Virginia are taxed by Section 2 (i). Perhaps appellee's activity would come within the provisions of Section 2 (i) if appellee were engaged in the business of leasing films in West Virginia. But this activity is carried on in New York and not in West Virginia and hence can not be and is not intended to be taxed by the statute sought to be invoked.

Appellant needlessly devotes much of his brief to the proposition that the exhibition of films is a local activity that may be taxed by the State—an activity which is now being adequately taxed under Section 2 (g) and the validity of which tax is not challenged in this case and is not before the Court. Then he returns to his original claim that appellee should be taxed under Section 2 (i), not for the once-taxed exhibition of films, but for the New York activity of leasing films (or "collecting rent" as he chooses to call it)—a claim which is repugnant to the Commerce Clause as well as to the statute involved.

Appellant's position is not clear but it would seem to be clear that the offending tax cannot validly be imposed under any position or theory.

It is respectfully submitted that appellee is not engaged in West Virginia in the business of collecting incomes from the use of personal property; that the distribution of films by appellee is interstate commerce; and that the proceeds derived by appellee from its leasing of films in interstate commerce may not validly be taxed by the State of West Virginia under the statute sought to be invoked or in any other manner.

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